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AI AND THE LEGAL PROFESSION: COULD ARTIFICIAL STUPIDITY AND RESPONSIBILITY AVOIDANCE PROVE TO BE THE BIGGEST AGENTS OF CHANGE?

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I. INTRODUCTION

That "computer" was once a job description—a profession—is probably a fact few people know. Or remember—it was not that long ago.[1] A similar fate may await "printers," once a term associated primarily with the typographical trades rather than something that sits on your desk. Scriveners no longer exist even in the form of peripheral equipment, though a word processing program bearing the name is available.[2] As a human profession—one directly related to the practice of law—scriveners have been mostly driven out of existence in the United States by copy machines and typewriters, living on mainly as the stubborn character working in the law offices of the Herman Melville short story bearing his name.[3]

One could probably come up with a long list of "-er/-or" jobs that were once performed by humans that have either disappeared completely or have been or are in the process of being replaced by pieces of equipment, computers, or (more recently and fashionably) robots and artificial

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1. *See, e.g.*, MARGOT LEE SHETTERLY, HIDDEN FIGURES: THE AMERICAN DREAM AND THE UNTOLD STORY OF THE BLACK WOMEN MATHEMATICIANS WHO HELPED WIN THE SPACE RACE (2016) (describing the role played by African-American women "computers" in the American space program).

2. *Scrivener*, LITERATURE AND LATTE, https://www.literatureandlatte.com/scrivener/overview (last visited Feb. 18, 2018).

3. HERMAN MELVILLE, BARTLEBY THE SCRIVENER (1853). The UK still has a small "scrivener notary" profession, which has ancient roots and offers civil law notarial services. *See* THE SOCIETY OF SCRIVENER NOTARIES, http://www.scrivener-notaries.org.uk/ (last visited Feb. 18, 2018).

intelligence (AI). This Article will speculate about if and how this could happen to one such profession—lawyers.[4]

The subject of this symposium issue is the impact of AI on the practice of law. From the outset, I will leave it to other authors in this issue to grapple with the definition of AI. The possible threat to numerous professions, not just lawyers, is an interesting subject worthy of much consideration. It is also an exciting one when combined with parallel discourse about weaponized robots and killer drone swarms.[5]

My own belief is that we have yet to appreciate the full impact of older, yet still comparatively new, technologies such as the internet and mobile communications. These are essentially "dumb" technologies (the "artificial stupidity" in the title), yet they have impacted the practice of law and are new enough that the full potential of their impact may be yet to come.[6] As noted by Neil Postman, it took about half a century from the invention of the printing press before people started putting numbers on the pages of books.[7]

As for AI, what often seems absent from the debate about how it should interact with the law, yet may be particularly relevant to the practice of law, is the ways in which AI can (and inevitably will, in my view) be used by humans as a means of avoiding responsibility. There are precedents supporting this view as I will try to illustrate.

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4. I will leave it to others to speculate on the fate of another: professors.

5. *See, e.g.*, Jessica Schladebeck, *Experts Warn Against 'Killer' Drones in 'Slaughterbots' Video*, N.Y. DAILY NEWS (Nov. 21, 2017), http://www.nydailynews.com/news/world/experts-warn-killer-drones-new-slaughterbots-video-article-1.3648289.

6. I suppose it is incumbent on me to attempt to define "dumb technology." I would propose that it refers to technology that is programmed to react in a predetermined way to a specific factual input. "Dumb" is a demeaning term, of course, and should not mislead as to the potential ramification of any particular technology, where the limitations may not be so much "intelligence" as it is computing power. For example, facial recognition technology that can identify wanted criminals on the street from surveillance camera footage or voice recognition software that could validate the identity of persons making transactions over the telephone would constitute "dumb technologies" in my view. One could perhaps argue that AI is simply a higher order of such evaluative technologies, but from there it seems just a short step to the "does free will exist" question of human philosophy and is thus probably unhelpful. At the very least, what I consider "dumb technology" should behave in a way that is predictable to the person who designed it, so long as that person knows the inputs.

7. *See* NEIL POSTMAN, TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY 62 (Vintage Books 1st ed. 1993) (1992); Naomi S. Baron, *When Did Books Get Page Numbers—and Are They Even Useful Anymore?*, SLATE: LEXICON VALLEY (Feb. 11, 2015, 2:35 PM), http://www.slate.com/blogs/lexicon_valley/2015/02/11/page_numbers_where_did_they_come_from_and_are_they_even_useful_anymore.html.

II. DUMB TECHNOLOGY AND THE NEED FOR LAWYERS

That technology has changed the practice of law goes without saying. At the Washington, D.C. law firm where I was a summer associate in the early 1990s, I was given a desk with a pad of paper and a pencil and shown the location of the word processor room, full of human word processors operating a Wang mainframe system. As a junior associate in the days before email, the practice of international business transactions rotated around getting documents to the courier in time or faxing them for the close or opening of business on the other side of the world. Writing in 2018, I know at least one lawyer (younger than me!) who still dictates letters on cassette tape for his secretaries to type out. Such examples hopefully illustrate how technology that most young people probably take for granted has enabled lawyers to do more.

Yet technology has also hopefully freed lawyers and other fee earners from more mundane tasks such as printing out and collating documents, standing around fax machines, waiting for modems to connect to the Westlaw database, and so forth. Even the simple ability to do keyword searches, whether in a legal database or a document, has doubtless saved countless hours of junior associate time that can be fruitfully used (and ideally billed!) for tasks other than poring over reams of text.

In more sophisticated form, such technologies have revolutionized documentary discovery. Whereas complex corporate litigation might involve sitting in a room full of printed out emails and a team of lawyers and paralegals reading through them page by page, the sheer volume of digital records involved in such cases has effectively necessitated a search-term based approach. In 2012, I attended an international conference on the legal profession, and one of the speakers had a slide showing a picture of a server room: "this used to be done by lawyers" was his observation. An article dated the same year on the American Bar Association (ABA) website indicated external counsel were doing a poor job of accommodating the technological issues faced by institutional clients in responding to the challenges of e-discovery,[8] so perhaps further displacement by technology and people who understand it better is inevitable ("e-discovery professional" having apparently become a new legal practice-related job description).[9]

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8. Zachary G. Newman, *Hot Topics and Recent Court Decisions in E-Discovery*, AM. BAR ASS'N (June 20, 2012), http://apps.americanbar.org/litigation/committees/corporate/articles/spring2012-0612-hot-topics-recent-court-decisions-ediscovery.html.

9. Fittingly, perhaps, when reviewed in February of 2018, the "E-Discovery" portion of the ABA website containing the article cited in the preceding footnote did not appear to have

Yet while e-discovery or computer-assisted research may involve much augmentation and even substitution of human legal professionals with technology, it is still led by lawyers. In my view, however, the real impact of dumb technologies is probably *not* going to be seen in its further layering on top of tasks performed by lawyers and paralegals in a way that frees the humans involved from drudgery or makes their performance more efficient. While we are seeing these changes take place in the span of a lifetime—a career—I think the real impact of such innovation will be in reordering society and human interactions in a way that makes lawyers unnecessary in the first place.

I currently live in Guam. Although it is an American territory, buying some items from Amazon's U.S. website is difficult or impossible.[10] The system simply will not allow the order to be placed. In the case of some third-party sellers or items, a legal reason may underlie this, as Guam is outside the U.S. customs territory, but as a basic matter—arguably a *more* basic matter than whatever the law is—Amazon's system coding will simply not let the transaction close. Other commercial websites similarly generate different results in how transactions take place depending on whether their address input menu treats Guam as a "country" in a country menu or as a "state" within a sub-menu under the United States.

Perhaps a lawyer helped set this system up, but none seem necessary to keep it functioning. Moreover, the fact that I am a lawyer gives me no advantage in dealing with this manner of transacting. Like everyone else, I sign click-through contracts without reading their terms. What would be the point? My only choice is to transact or not. There is no way for me to start a "battle of the forms" or even a signature line where I could hope to scrawl in a petulant "subject to . . ." objection. As to any individual terms in the contract that I blindly click-sign, I would rather take my chances on the highly unlikely event of a post-facto dispute resulting in a finding that they are egregious or unconscionable. What other options do I have?

Similarly, to technological naifs like me, the content on my iPhone, including photographs and other content I have created, is protected (or not) and regulated first and foremost by what the various hardware and software elements will allow me to do with it. There does not appear to be any "iTunes

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been updated for over two years. It still contained an invitation to members to participate in an "upcoming" E-Discovery seminar in May 2015. *E-Discovery*, AM. BAR ASS'N, https://www.americanbar.org/groups/litigation/resources/e-discovery.html (last visited Feb. 18, 2018).

10. *See Amazon Shipping to Guam*, FLYCRATES, https://flycrates.com/amazon-shipping-to-guam (last visited Feb. 18, 2018).

rental stores" or even physical sharing for copyright lawyers to lament or make exaggerated claims about as there were with CDs or records before them.[11] Of course there are countless things protected by intellectual property laws lurking in my iPhone, but they play virtually no role in regulating the way I use it. Someone more tech savvy than I might try to do things to their iPhone that would actually implicate those laws, but I suspect the vast majority of iPhone users are, like me, regulated primarily by its code rather than law.

In his seminal 1999 book, *Code and Other Laws of Cyberspace*, Professor Lawrence Lessig posited that as more human activity starts to take place through computerized technology and over the internet, the code that makes it possible will increasingly supplant law as the means by which behavior is regulated.[12] The law Lessig was particularly concerned about was that of copyright, though in 2006, he published an updated version in which he discussed the broader implications (at the time) of how code could come to supplant law. He predicted "*[a] future of control in large part exercised by technologies of commerce, backed by the rule of law (or at least what's left of the rule of law)*."[13]

"What's left of the rule of law" may well require fewer lawyers. Right now, there are people using blockchain technology to write "smart" contracts that can self-execute in accordance with code-based interactions.[14] Probably few of them are lawyers, and self-executing contracts do not need lawyers for enforcement either.

Despite the "smart" in smart contract and the newness of blockchain, it is, in my view, still an example of essentially dumb technology—one that reacts in a predetermined way to specific events (transactions). It nonetheless

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11. *See, e.g.*, Mike Masnik, *Copyfraud: Copyright Claims on CDs Say It's Infringement to Loan Your CD to a Friend*, TECHDIRT (Dec. 28, 2012), https://www.techdirt.com/articles/20121226/13141921491/copyfraud-copyright-claims-cds-say-its-infringement-to-loan-your-cd-to-friend.shtml.

12. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

13. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 2.0, at 4 (2nd ed. 2006).

14. According to Ethereum, the decentralized blockchain smart-contracting platform, smart contracts:

> contain code functions and can interact with other contracts, make decisions, store data, and send ether to others. Contracts are defined by their creators, but their execution, and by extension the services they offer, is provided by the ethereum network itself. They will exist and be executable as long as the whole network exists, and will only disappear if they were programmed to self-destruct.

Building a Smart Contract Using the Command Line, ETHEREUM (last visited Feb. 10, 2018), https://www.ethereum.org/greeter.

seems likely to revolutionize the practice of law, even if by just making lawyers superfluous in growing areas of commerce and daily life it touches.

Regardless of their specialty, most lawyers are essentially intermediaries; they add value by bridging an uncertainty-based gap between client and client goals. A client's uncertainty may come in the form of a lack of trust in a proposed counterparty, ambiguous wording in a statute or regulation, inability to comprehend the ramifications of complex documentation, a circuit split on the interpretation of a statute, or vaguely perceived risks of numerous other kinds. Lawyers add knowledge and experience-based evaluative capabilities. They can help enforce a transaction against a recalcitrant counterparty or judgment debtor and can even be an additional liability nexus in complex transactions or litigation; if it goes poorly, lawyers can be sued for negligence.

To the extent technologies such as blockchain eliminate uncertainty and remove the traditional trust/don't trust dichotomy from the equation, they make lawyers and other transactional intermediaries superfluous. The same is true of technologies that validate ownership, identity, or status. If predictions prove true about the potential of blockchain to facilitate the monetization of vast quantities of land in developing nations by making it possible to establish and maintain reliable land title records,[15] one wonders if there will be much left for conveyancing lawyers to do in places where this actually happens.

The degree to which a dumb technology, like blockchain, alone can supplant human professionals may be particularly hard for Americans to grasp because of their nation's archaic reliance on courts and lawyers who participate in what is often a façade of litigation to produce documentary proof of legal status or ownership. On this point, alternatives can be demonstrated without even bringing technology into the discussion. Here, I must ask the reader to indulge in a brief diversion into another area of my research, Japanese law.

In Japan, bigamy is a crime.[16] It is also a crime that is difficult to commit. Japan has a family registry system in which a marriage (involving at least one Japanese person) must be registered in order to take effect.[17] The same is true of divorces.[18] Births and deaths are also recorded in the registry system, as are

15. *See, e.g.*, DON TAPSCOTT & ALEX TAPSCOTT, BLOCKCHAIN REVOLUTION: HOW THE TECHNOLOGY BEHIND BITCOIN IS CHANGING MONEY, BUSINESS, AND THE WORLD 193–95 (2016).

16. KEIHŌ [PEN. C.] 1907, art. 184 (Japan).

17. KOSEKIHŌ [FAM. REG. ACT] 1947, art. 16, para. 1 (Japan); MINPŌ [CIV. C.] 1896, art. 739, para. 1 (Japan).

18. KOSEKIHŌ, art. 76; MINPŌ, art. 763–64.

the formation and dissolution of adoptive relationships.[19] Since the registry system is designed to provide a current snapshot of a person's family status, someone who the system showed as currently married would be prevented by the registry administrators from registering a second marriage. Thus, although most records are now computerized, even when it was a paper-based system with handwritten entries, the system has long functioned in a code-like fashion by preventing prohibited "transactions" such as bigamy from occurring in the first place.[20]

Moreover, consensual divorces and the dissolution of some adoptive relationships can be conducted merely by filing paperwork with the registry authorities; approximately 90% of divorces—including many involving allocations of parental authority over children—take place in this fashion.[21] A court's involvement is only needed if parties cannot agree on the terms of the divorce or if one party does not want to separate; the very small proportion of divorces and resulting allocations of parental authority over children of the marriage that are accomplished through a court decree are also reflected in the registry, making it unnecessary to ever use a court document as proof of divorce.[22]

Marriage licensing is one of many possible applications for blockchain,[23] but the point is not just that technology can replace existing legacy systems. A person with just a marriage certificate—whether paper or blockchain-derived—can prove that he or she married a particular person on a particular date in the past but will still be unable to prove the marriage is still in force today because proving the absence of a divorce decree somewhere is practically impossible. Before the internet, let alone blockchain, even existed, such proof was possible through Japan's family registry system; official extracts of which serve to prove a person's birth, death, age, marriage,

19. KOSEKIHŌ, art. 49–59 (birth); KOSEKIHŌ, art. 86–94 (death and disappearance); KOSEKIHŌ, art. 66–69-2 (adoption); MINPŌ, art. 799, 800, 812 (adoption). Note that Japanese law provides for two types of adoption, but it is not necessary to distinguish between them for purposes of this Article.

20. There is of course the possibility of human error or caprice on the part of the human administrator. For an overview of the system in English, see Colin Jones, *Family Registers: Appreciating Japan's Koseki System*, JAPAN FORWARD (Sept. 28, 2017), https://japan-forward.com/family-registers-appreciating-japans-koseki-system/.

21. *Id.*

22. KOSEKIHŌ, art. 15.

23. ARSHDEEP BAHGA & VIJAY MADISETTI, BLOCKCHAIN APPLICATIONS: A HANDS ON APPROACH 54 (2017).

divorce, parentage, and so forth.[24] The existence of the family registry system means that court decrees are not used as proof of status in Japan the way they are in the United States.[25]

Similarly, family register records can also be used to establish the universe of a decedent's possible heirs, and if all of those heirs are present and agree to a disposition, funds may be released from a bank account or real estate re-titled, all without going to court for proceedings to settle an estate. There is a rich body of literature on the subject of why Japan has so few lawyers and why Japanese people litigate with such less frequency than Americans.[26] Some of it is fanciful (none of the works cited below are), but to my knowledge, none of this literature addresses one possible and very basic factor: that courts in Japan are not needed or used to produce official documents, whether a divorce decree or letters probate, as they are in the United States and other common law jurisdictions.

While there do not appear to be statistics on this exact point, the number of American lawyers who pay their rent in part through uncontested divorces or routine probate matters is unlikely to be small. In Japan, they probably do not exist.

To return to the subject at hand, the point of this diversion is not to argue that the Japanese family register system is necessarily better.[27] The point is

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24. Of course, the situation gets more complicated when Japanese people get married or divorced abroad, though the register system does allow for filings from abroad. KOSEKIHŌ, art. 40–42.

25. The Civil Code rules on parental authority are also clear and unambiguous: mother has it over children born out of wedlock (absent circumstances), mother and father have it during marriage, and only one parent has it after divorce. MINPŌ [CIV. C.] 1896, art. 818–19 (Japan). A family register extract thus also serves as proof of who is responsible for minor children and has legal authority to deal on their behalf.

26. *See, e.g.*, Frank K. Upham, *Weak Legal Consciousness as Invented Tradition*, *in* MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN 48, 57, 59–61 (Stephen Vlastos ed., 1998); John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 362, 385 (1978); Tom Ginsburg & Takao Tanase, *Japanese Litigiousness and "Taking Kawashima Seriously"*, Proceedings from the 2005 Sho Sato Conference in Honor of Takao Tanase (Feb. 12–13, 2005), *available at* https://www.law.berkeley.edu/wp-content/uploads/2015/07/ginsburg-tanase-comment.pdf; Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 L. JAPAN 1 (1974). On the subject of lawyer numbers, it is important to be aware that Japan has a multitude of legal professions, only one of which is privileged to represent clients in all Japanese courts. *See, e.g.*, Colin P.A. Jones, *Amakudari and Japanese Law*, 22 MICH. ST. INT'L L. REV. 879, 907–23 (2014).

27. Among other things, its inflexibility (a bug for individual families and their members, a feature for everyone else who needs to rely on register records to produce a reliable, *unambiguous* picture of a person's current status) imposes arguably outmoded family structures and requirements on Japanese people and is the subject of widespread criticism (including by

that it is possible to imagine a way of organizing existing government and society in a way that requires fewer lawyers without even bringing technology into the equation.[28]

Moreover, to the extent that available technology favors a particular manner of organizing particular relationships or transactions through lowering costs and increasing certainty, it seems logical to anticipate further re-organization of peripheral relationships and transactions in a similar manner. As a static concept, a blockchain-based marriage registry makes perfect sense. But if in the near future there are also widely-used, blockchain-based systems of real property title registration, share ownership, or banking transactions, does it not seem inevitable that, at some point, the systems would start to interconnect (particularly in community property jurisdictions)? Doubtless, lawyers will still find things to argue about in divorce cases, but who actually owns what may not be one of them.[29]

Perhaps it is odd to focus on how dumb technology could change or eliminate large sectors of the practice of law relating to the ancient institution of marriage. But one could also turn to corporation law, where the possibility looms of blockchains replacing shares, corporations themselves,[30] content licensing,[31] or countless other facets of commerce where lawyers have traditionally played an important role in preparing or verifying documents, which can now be replaced by technology. But this technology is still dumb technology.

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this author). *See, e.g.*, Colin P.A. Jones, *Japan's Koseki System: Dull, Uncaring but Terribly Efficient*, JAPAN TIMES (June 22, 2016), https://www.japantimes.co.jp/community/2016/06/22/issues/japans-koseki-system-dull-uncaring-terribly-efficient/; Colin P.A. Jones, *Japan's Discriminatory Koseki Registry System Looks Ever More Outdated*, JAPAN TIMES (July 10, 2016), https://www.japantimes.co.jp/community/2016/07/10/issues/japans-discriminatory-koseki-registry-system-looks-ever-outdated/#.WiTVVTT8lBM.

28. Moreover, the family register system is merely one example of what could be called a "pre-computer technology" code system. As I have posited elsewhere, the Japanese postal system's *naiyō shōmei* (contents confirmed) letter service makes it possible to send a letter with external confirmation of both the delivery and the contents and to deliver a threatening letter that implies the sender is seriously contemplating legal action without actually hiring a lawyer to send such a missive on law firm letterhead. Colin P.A. Jones, *9/11: The Day Japan's Supreme Court Went (Slightly) Postal*, JAPAN TIMES (Oct. 9, 2016), https://www.japantimes.co.jp/community/2016/10/09/issues/911-day-japans-supreme-court-went-slightly-postal/.

29. How court orders to change title of property will be enforced against a blockchain-based system is another interesting question. The answer seems likely to involve a solution requiring little or no lawyer time once implemented.

30. TAPSCOTT & TAPSCOTT, *supra* note 15, at 87–144.

31. *Id.* at 226–40.

III. AI, RESPONSIBILITY, AND THE FUTURE OF THE LEGAL PROFESSION

I believe it can be said that attorneys are able to make a living as intermediaries because of *trust*. It is common for lawyers to be characterized as shysters, and they do not poll well on the subject of trust.[32] However, pollster questions probably do not distinguish between other people's lawyers and *your* lawyer.

You, as a client, presumably trust your lawyer because the lawyer has (or at least appears to have) a suitably comforting combination of education and experience in whatever legal matters you are using them for. A good attorney will be (and should be) well-attuned to the emotional elements of your matter, not just the legal and factual issues. As noted above, dumb technologies, like blockchain, may remove the decision of whether to trust a transaction or a person (as opposed to an entire system) from the equation. However, outside those spheres, the role of lawyers as a trusted profession is likely to still be meaningful—for a while at least.

In this aspect of the legal practice, even AI seems to be at a significant disadvantage to its human competitors. I may trust a reactive, evaluative computer algorithm to play the best possible game of chess, or strafe a terrorist bunker with surgical precision, but can it *advocate* persuasively to human audiences (assuming such advocacy remains a necessary feature of society)? For all the databases and analytical power an AI-enabled robo-lawyer could muster, would we want it to make the decisions about whether to pursue a case—*your* case? Will technologists be able to create AI who *care* about justice or what its failure means to society? Would our AI robo-lawyer ever be able to evaluate the likelihood of success and merits of pursuing cases like *Gideon v. Wainwright*[33] or *Miranda v. Arizona*?[34] Would they consider it worthwhile to pursue a writ of *coram nobis* for Fred Korematsu to vacate the unjust conviction he was burdened with through the Supreme Court case that bears his name?[35]

It seems difficult to assume that an AI can be made to care about anything that has been important to humans, and caring has arguably long been a key

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32. *See, e.g.*, *Honesty/Ethics in Professions*, GALLUP (last visited Feb. 10, 2018), http://news.gallup.com/poll/1654/honesty-ethics-professions.aspx (illustrating a Gallup poll of Honesty/Ethics in Professions that was conducted December 7–11, 2016, showing 82% of respondents ranking lawyers in the bottom three of five possible levels of trustworthiness, with 45% viewing them as only "average").

33. Gideon v. Wainwright, 372 U.S. 335 (1963).

34. Miranda v. Arizona, 384 U.S. 436 (1966).

35. Korematsu v. United States, 323 U.S. 214 (1944).

element of the practice of law. One likes to think. But caring is just one facet of the lawyer-client relationship.

My assumption is that lawyers care about their matters for a variety of reasons. Some may seek justice; others may take pride in their work or derive emotional satisfaction from helping clients achieve goals; some (but surely only a few) are just in it for the money. But whatever their personal motivation, I assume that lawyers also care about their matters *because they have to*. The rules of professional conduct and liability mean that lawyers can be relied upon—trusted—because they can be disciplined, disbarred, or sued for professional malpractice if they fail to perform to a certain standard. This is in addition to the competitive and customer satisfaction imperatives applicable to any business in the service industry that lawyers must also grapple with. This is part of the trust.

Could the rules of professional responsibility ever be made to apply meaningfully to a non-human, AI lawyer? I will leave the answer to technologists, but I have my doubts. But those expecting this to transition into a conclusion favoring human lawyers should be warned that it will not.

You see, one of my basic assumptions about responsibility is that it sucks. For the most part, "to take responsibility" has negative connotations of sanction or blame. Unless the rewards for taking responsibility are commensurate with the risks that accompany it, avoiding responsibility is perfectly rational human behavior. Formal decision-making in the American legal system is dominated by juries and judges. The true genius of the jury system is arguably that it provides a clear nexus of responsibility for the results of a trial that disappears instantly upon rendering its verdict. To the extent the judges making decisions—including decisions about whether congressional legislation shall remain in force—are federal judges, a defining characteristic of their status is they can almost never be held to account for anything they do on the bench.[36]

Lawyers can blame a bad result on a judge, jury, or regulator, but they are still compensated, in part, for being identifiably and incontrovertibly responsible for things that happen, such as filings being made on time, cases being cited accurately, documents being read and drafted properly, and so forth. But what if such things are done automatically by robots? And who is responsible if they get things wrong, as they surely will?

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36. U.S. CONST. art. III, § 1. This may seem to be stating a truism of the justice system, but some countries do not use jury systems widely or at all and have judges who are essentially bureaucrats within a career system. The decisions these judges make can affect how they are evaluated and promoted within that system. *See, e.g.*, Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 KOBE U. L. REV. 45, 46–48 (1991).

An interesting debate that has sprung from the development of AI and military technology is whether autonomous weapon-equipped drones should be given discretion to make targeting and launch decisions without human intervention.[37] Recurring themes involve both the morality of letting robots decide to kill humans and how such killings should fit into the existing framework of the laws of conflict.[38] The Pentagon has issued statements that humans will always be involved in "kill" decisions,[39] yet a growing chorus of experts has expressed alarm about the development of autonomous war machines.[40]

Yet based on my own admittedly cynical assumptions about how most people view responsibility, I think much of this debate fails to address the possibility that humans will come to find AI a convenient responsibility nexus. AI can take responsibility for decisions humans would rather not make and actions they would rather not take. Research shows that even most trained soldiers have an aversion to killing other human beings,[41] and a great deal of military technology developed well before drones—automatic weapons, long-ranged artillery, aerial bombardment—is arguably effective not only because of its destructive power but because it inserts delay and distance between

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37. *See, e.g.*, Amos N. Guiora, *Accountability and Decision Making in Autonomous Warfare: Who is Responsible?*, 2017 UTAH L. REV. 393, 397 (2017); Peter Finn, *A Future for Drones: Automated Killing*, WASH. POST (Sept. 19, 2011), https://www.washingtonpost.com/national/national-security/a-future-for-drones-automated-killing/2011/09/15/gIQAVy9mgK_story.html?utm_term=.545c207a1a59; ROBIN GEISS, FRIEDRICH EBERT STIFTUNG, THE INTERNATIONAL-LAW DIMENSIONS OF AUTONOMOUS WEAPONS SYSTEMS 17–18 (2015), http://library.fes.de/pdf-files/id/ipa/11673.pdf; NILS MELZER, EUR. PARLIAMENT DIRECTORATE-GEN. FOR EXTERNAL POLICIES, HUMAN RIGHTS IMPLICATIONS OF THE USAGE OF DRONES AND UNMANNED ROBOTS IN WARFARE 11 (2013), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf; Daniel Suarez, *The Kill Decision Shouldn't Belong to a Robot*, TED (2013), https://www.ted.com/talks/daniel_suarez_the_kill_decision_shouldn_t_belong_to_a_robot/discussion.

38. *See, e.g.*, James Foy, *Autonomous Weapons Systems: Taking the Human Out of International Humanitarian Law* (Apr. 20, 2013), https://ssrn.com/abstract=2290995; Jeffrey S. Thurnher, *The Law That Applies to Autonomous Weapon Systems*, ASIL (Jan. 18, 2013), https://www.asil.org/insights/volume/17/issue/4/law-applies-autonomous-weapon-systems.

39. Spencer Ackerman, *Pentagon: A Human Will Always Decide When a Robot Kills You*, WIRED (Nov. 26, 2012, 8:12 PM), https://www.wired.com/2012/11/human-robot-kill/.

40. *See, e.g.*, Paul Scharre, *The Trouble with Trying to Ban 'Killer Robots'*, WORLD ECON. F. (Sept. 4, 2017), https://www.weforum.org/agenda/2017/09/should-machines-not-humans-make-life-and-death-decisions-in-war/ (referencing an open letter by CEOs of 100 artificial intelligence and robotics companies to the U.N. warning of the dangers of autonomous weapons).

41. *See* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 89, 111, 180 (2009) (describing the psychological effects of killing that humans endure during war).

human actions and the death and horror it causes. While the morality of doing so may be questionable, it seems inevitable that the seductive and understandable ability to ease the psychological burdens of killing means the advent of autonomous war machines will be a matter of when, not if.[42]

In fact, the debate may not be as new as we think; modern society has already spent decades, if not centuries, grappling with the moral and legal ramifications of creating artificial beings, regulating how they make decisions, and allocating responsibility for the things they do. These beings are called corporations.[43]

I recognize that there is a fundamental difference between corporations on the one hand and robots/AI on the other. Obviously, the former are creations of law and the latter of technology. But the subject at hand is responsibility.

For years now I have been asking rooms full of law students some very basic questions—why do we use corporations? What is the advantage they have over human beings? Based on my rough recollection, I would say that the most common answer is that corporations limit liability, and the second most common is that corporations enable a pooling of resources and similar collective effort.

None has ever—not without much prodding, at least—given what I consider to be the most historically accurate, if not fundamentally correct, response: we use corporations because they do not die, at least not unexpectedly. They thus play a very basic role in freeing business and ownership from the terrible unpredictability of human mortality.[44]

Facilitating collective investment and action is of course another basic reason for using corporations. Yet it does not follow that limited liability is naturally part of the package. One of the older corporate forms still with us is the general partnership, the defining characteristic of which is the joint and

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42. Colin P.A. Jones, *Why Robots Will Be Granted a License to Kill, in Japan and Everywhere Else*, JAPAN TIMES (Mar. 11, 2015), https://www.japantimes.co.jp/community/2015/03/11/issues/robots-will-granted-license-kill-japan-everywhere-else/#.Wi0aODT8lBM.

43. Writing in 1898, Maitland exclaimed that, "Such in these days is our 'propensity to feign' . . . that the law can find no place for the new persons, the new *species* and *genera* of persons, whom we are daily calling into existence." FREDERIC WILLIAM MAITLAND, TOWNSHIP AND BOROUGH 15–16 (Cambridge Univ. Press 1964) (1898).

44. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 208 (Bernard C. Gavit ed., Washington Law Book Co. 1941) ("As all personal rights die with the person, it has been found necessary, when the public is benefitted by the continuance of particular rights, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.").

several liability of its partners.[45] Going back far enough in time, we find that being a member of a corporation involved being potentially liable for the satisfaction in full of its debts.[46] Limiting liability to the amount invested is generally associated with joint stock corporations, the establishment of which is typically historically associated with the highly risky business of exploiting foreign colonies, and thus serves a quasi-foreign policy role.[47] Although, by the time Blackstone wrote his *Commentaries* in the mid-18th century, such entities were already being used in the development of domestic ventures, yet he did not seem to find joint stock companies worthy of even mentioning in his *Commentaries*.

While limited liability is not, collective action arguably *is*, or at least was, a fundamental characteristic of corporations. A mere century ago, F.W. Maitland was able to write a deeply insightful essay on the puzzling nature of the corporation sole, a corporation with but a single human member—why was it necessary to create a legal person separate from its sole member?[48] Indian company law did not provide for a single-shareholder corporation until it was amended in 2013, and even then, the law is subject to a limit that the same person can only be a member of one such entity.[49] Philippines' company law still requires at least five shareholders in order to incorporate a company.[50]

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45. For a discussion of a suitable vintage, see, for example, George Wharton Pepper, *What Constitutes a Partnership*, 46 AM. L. REG. 137, 142 (1898).

46. *See, e.g.*, 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 487, 520 (2nd ed. 1898) (stating, on page 487, that, "If we insist that the common law can not [sic] hold the *singuli* liable for the debt of the *universitas*, we shall find little to say about corporations in any century earlier than the fifteenth," and stating, on page 520, that, "We have indeed observed before now that the non-liability of individual corporators for the debts of the corporation *can not* [sic] *be regarded as of the essence of a corporation*. Still unless such non-liability had been common, the modern idea of a corporation would hardly have been formed." (third emphasis added)).

47. Philip Lipton, *The Evolution of the Joint Stock Company to 1800: A Study of Institutional Change* 13 (Monash Univ. Workplace & Corp. Law Research Grp., Working Paper No. 15, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413502 ("[I]ncorporation and trade monopolies were granted by Royal charter to those who furthered government policy by equipping the navy, establishing colonies or discovering new trading routes" that opened up lucrative commercial opportunities and diminished reliance on other countries for access to Asian commodities, especially spices.).

48. F.W. MAITLAND, *The Corporation Sole*, *in* STATE, TRUST AND CORPORATION 9–31 (David Runciman & Magnus Ryan eds., 2003) (1900).

49. The Companies Act, No. 18 of 2013, INDIA CODE (2013); *FAQs on One Person Company*, MINISTRY OF CORP. AFFAIRS GOV'T OF INDIA, http://www.mca.gov.in/MinistryV2/onepersoncompany.html (last updated Feb. 13, 2018).

50. CORPORATION CODE, § 10, B.P.Blg. 68 (Phil.).

Yet in the Western world, at least, it seems to have become an article of faith that the principal reason for incorporating is to limit liability.[51] Not only for debts and torts committed by the business but for taxes as well.[52] We find it not the slightest bit odd that each of us can individually create multiple corporations in which we own 100% of the shares, use them to earn money, and have them pay us salaries and buy things we need and use, all the while protecting our *personal* assets from the taxes and other consequences of the company's activities. Even though, in reality, these activities are our own. And, if through mistake or malice, our companies cause harm to others or, to put it more accurately, if we cause harm to others through our companies, we personally are generally safe from its consequences unless we have done something to allow the corporate veil to be pierced.

The intent is not to decry corporate shields or debate the merits of limited liability or tax policies that encourage the use of corporate vehicles. As already noted, my basic assumption is that avoiding responsibility—a synonym for "liability," after all—is perfectly rational human behavior. That people use the tools available for doing so is only natural, as is the fact that many lawyers now practice through limited liability partnerships or companies.[53]

The point is that we tend to lose sight of the fact that our economic growth is based in part on encouraging potentially irresponsible behavior through the proliferation of limited liability entities. This often tends to be done in the name of "innovation" or "entrepreneurship," but, to paraphrase the perennial caution about fun given by parents to children playing with pointy sticks or pellet guns, it's only innovation until someone loses an eye.[54]

This may be a Good Thing for our economic welfare, but it also seems to mean that extremely terrible things—death from defective products, even

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51. *See, e.g.*, E.J. Dealy, *Five Reasons Why a Small Business Should Incorporate*, FOX BUS. (Mar. 23, 2016), http://www.foxbusiness.com/features/five-reasons-why-a-small-business-should-incorporate ("No. 1. Personal asset protection . . . . In a properly structured and managed corporation or LLC, owners should have limited liability for business debts and obligations."); CT Corporation Staff, *When Should I Incorporate?*, WOLTERS KLUWER (Nov. 9, 2017), https://ct.wolterskluwer.com/resource-center/articles/when-should-i-incorporate ("Limited liability protection—Operating as a sole proprietorship invites risk . . . . If your business incurs debts (if you can't pay your suppliers or commercial lease, for example) or an accident occurs, then you are personally liable for them. If a corporation or LLC owns the business, that corporation or LLC is liable for its debts, not its shareholders or members.").

52. Dealy, *supra* note 51 ("Both corporations and LLCs may deduct normal business expenses, including salaries, before they allocate income to owners.").

53. *See* Allison Martin-Rhodes et al., *Law Firms' Entity Choices Reflect Appeal of Newer Business Forms*, LAW FIRM ORG., July/Aug. 2014, at 16, 18.

54. And the person who does is usually not the innovator.

systemic financial collapse—can happen without anyone being held responsible for them. Corporations cannot be imprisoned, finding their managers criminally liable is difficult, and the pursuit of civil liability is likely just an insurance claim for those pursued.[55] Again, depending on your perspective, this is a feature, not a bug.

So, what could this mean for AI that could purport to practice law beyond ministerial tasks and "dumb technology" information processing or even just to assist human lawyers to make better decisions? There are, I think, two sides to the question: the client side and the attorney side.

In the American system, clients are, of course, free *not* to seek counsel. Consulting an attorney usually involves costs and makes life complicated—a client who consults a lawyer either needs to follow their advice or be able to justify not doing so. For the manager or director of a corporate client, not getting legal advice, or not following it when given, can have grave implications—responsibility!—if things go wrong.

Let us suppose that a sophisticated corporate client needs advice on how arcane U.S. security regulations are likely to apply to a highly atypical set of facts or proposed transaction. The applicability of the regulations and rendering of any sort of advice requires reviewing countless SEC no-action letters and publicly available telephone interpretations.

We shall also suppose that the client has two options. First, the client can consult a top Wall Street firm, one with partners who have worked at the SEC in the staff, and brilliant junior associates who can work punishing hours researching the appropriate databases. Second, the client can consult an AI that can quickly research all relevant databases in order to identify and analyze relevant comparatives.

In both options, the client will be given an evaluation and a recommendation. The AI will be sophisticated enough to give its advice with suitably lawyerly hedging—if it deems it appropriate. When initially presented with these two options, it seems likely the client would seek recommendations from both and compare.[56]

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55. *See* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, at XV (2016) ("Working people suffer the injustices while corporations and their executives get away with everything up to and including homicide.").

56. Of course, if it is an either-or choice, other factors may be determinative. Which costs more? Is the AI a sunken capital expenditure or made available on an operating expense basis, like most attorney fees? If the latter, how does it compare to the cost of human legal advice? Let us acknowledge that, in the real world, these too will likely be important considerations before consciously ignoring them for purposes of this discussion.

How should the client deal with discrepancies in advice given by the AI and the client's human lawyers (if any)? Some insights may be derived from a chapter by Jason Millar and Ian Kerr in a recent book on the law of robotics. [57] Approaching the problem of robot and human expert disagreement, principally in the context of medical diagnoses and whether human experts should have an "override" over evaluations by robot-experts, they suggest there might be four possible scenarios: (i) the AI and human agree, and there is a positive ("desirable") outcome; (ii) the AI and human agree, and there is a negative ("undesirable") outcome; (iii) the AI and the human disagree, but the AI gets it right (i.e., the outcome is positive if the AI's advice is followed but not if the human's is); and (iv) the AI and the human disagree, but the AI gets it wrong (i.e., the reverse of situation (iii)). [58]

Millar and Kerr dismiss scenarios (i) and (ii) as being of "little interest," since scenarios where both options generate positive outcomes are unlikely to be controversial, and where both produce bad results, both human and robot are equally blameworthy. [59] As I will show shortly, I believe things are actually more complicated, particularly in scenario (ii).

Discussing the ramifications of scenarios where robots "get it right," Millar and Kerr point out that this evaluation would have been validated by empirical evidence and thus difficult for human experts to argue against. [60] This would render it of questionable merit to accord human experts an "override" over any particular decisions the robot-expert seeks to make, the exercise of which would be "contra-evidence based." [61] Millar and Kerr conclude that:

> Owing to the evidence in their favor . . . , it is more appropriate to think of expert robots as above average in their ability to make decisions that will produce desirable outcomes. This fact suggests that granting a general decision-making authority to human experts will be problematic once expert robots are properly on the scene. [62]

Interestingly, their conclusions about giving humans decision-making authority over expert robots do not change even when the robot gets it wrong.

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57. Jason Millar & Ian Kerr, *Delegation, Relinquishment, and Responsibility: The Prospect of Expert Robots*, *in* ROBOT LAW 102–27 (Ryan Calo et al. eds., 2016).

58. *Id.* at 119–24.

59. *Id.* at 120.

60. *Id.* at 120–21.

61. *Id.*

62. *Id.* at 122.

This is because, in any particular case, a human expert demonstrably getting it right could be an example of the human expertise being superior to that of the robot, but "if one accepts the normative pull of evidence-based practice, then they are *always* cases of *moral luck*."[63]

> Evidence-based practice suggests that we ought to act according to the best available evidence, and, in cases of robot-human expert disagreement, that means we ought (ethically) to delegate decision-making authority to the robots when we know that they outperform human experts. Cases in which human experts over-ride expert robot decisions are, *ceteris paribus*, ethically problematic. That on occasion a human expert might override an expert robot's decision and produce desirable outcomes does not provide any *systematic* criterion for generating the best outcomes. Evidence-based practice, on the other hand, is meant to accomplish just that. It is only by *post hoc* analysis of cases of disagreement (or any case involving co-robotics involving expert robots) that we can assess the competing possibilities relative to one another. Prior to the outcome, that is, at the time when we are forced to make decisions, both choices look identical—there is no systematic overriding consideration upon which to base a decision other than the expert robot's evidence-based track record.[64]

They close their consideration of these four scenarios with the conclusion that "it is not difficult to imagine a smooth and simple logic that would lead a society like ours to delegate increasingly significant decision-making to future Watson-like robots."[65]

So informed, let us return to the dispensing of legal advice by human and robot-experts. Assuming that evidence-based "good" and "bad" results are capable of actually (or seemingly!) objective verification in the same way as medical diagnoses, I think it can be supposed that it would follow the same progression. However, I also think it is fanciful to suppose that human lawyers and AI-lawyers would coexist in the same advisory sphere for long past a certain stage in the latter's development. Once an AI is validated as providing at least as reliable advice as human lawyers, why would clients keep using humans with all else being equal?

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63. *Id.* at 123 (citing THOMAS NAGEL, MORTAL QUESTIONS (1979); BERNARD WILLIAMS, MORAL LUCK (1981)).

64. *Id.*

65. *Id.* at 124. "Watson" is IBM's AI platform. *See Watson*, IBM, https://www.ibm.com/watson/ (last visited Feb. 19, 2018).

They will not be equal, perhaps; in our arcane securities regulation question, a client might attach particular significance to the human's experience in the SEC and who the human knows there. It seems unlikely that AI will be able to replace humans in having human connections, but then we are not really talking about legal advice. In any case, AI will probably at least become very good at predicting how repeat actors—judges and other decision makers—respond to particular motions, arguments, or fact patterns.[66] So, again, why would clients rely on human lawyers for anything other than an aspect of the problem that does not require legal advice?

One possible answer is that human lawyers might be desirable for recourse. But then we need to look at the other side of the equation and ask why human lawyers would stick around to either assume liability for an AI's bad decision by endorsing it, or risk liability by preventing an AI's decision from being implemented by second guessing it if the human turns out to be wrong? Once the robots get to a certain level of verifiable reliability, it would seem there is nothing but downside for human professionals to remain in that space.

I also think Millar and Kerr are wrong in dismissing scenario (i) (robot and human are both right) and scenario (ii) (robot and expert are both wrong) in the same breath as "relatively unproblematic." They are actually quite different in a very crucial way. In (i) there is no liability issue, while in (ii) there is. More importantly still, in (ii) a human expert's errors can result in them suffering reputational or financial harm, even imprisonment, if their negligence is criminal. A robot's reputation might suffer (until the next upgrade), but otherwise, it is indifferent to being wrong; it is immune to the most basic deterrent, punitive and restorative aspects of the law—as are corporations.

In fact, Millar and Kerr seem to fudge the question of liability—responsibility for bad outcomes—or at least treat it as a problem to be solved rather than a possible feature to be enhanced and exploited. They do posit that "when time-sensitive decisions must be made and human and robot-experts disagree, and where an undesirable outcome is the result of the decision because either the expert robot or human expert was in error, it will be difficult to assess liability in the established way."[67] They suggest "first principles or useful common law analogies" might be a solution for robot-expert failures, that the issue could be resolved in the "usual manner," and that "human

66. This modeling, of course, ignores the possibility that AI-based decision-making processes will also be playing a greater role within institutions like the SEC and thus making "who you know" less important.

67. Millar & Kerr, *supra* note 57, at 123.

experts would be called in to give testimony . . . . Eventually, a judge would weigh the evidence of the competing experts and decide whether the standard of care was breached or not."[68]

But they immediately acknowledge the difficulty of determining the appropriate standard of care for a robot, the resulting paradox of possibly having "no evidentiary rationale for explaining the [bad] outcome generated by the expert robot," and the difficulty or impossibility of formulating "an explanation on behalf of the medical center's reliance on the expert robot."[69] This is an important point; what standard of care should apply once the medical center (or legal advice provider) can say with supporting statistical evidence, "We ran the scenario through our AI, which has proved to be correct X% of the time?" X will likely be a crucial number, but how low does it have to be for the defendant to have done more?[70]

Perhaps claims can still be brought against the humans who made, programmed, or relied on the robot or the AI controlling it. But the robot being firmly located between the resulting harm and any putative human tortfeasors in the causal chain would make the pursuit more tenuous than it already is. As would, no doubt, the inevitable intermediation of numerous corporate entities.[71]

This may actually suit clients and lawyers perfectly well. Clients will be able to satisfy whatever internal or external responsibility they have to seek legal advice by consulting with a demonstrably competent AI. Lawyers—if they still exist in the relevant sphere—can turn the matter over to an AI and say it was the best they could do, a statement which may well be true at some point and which should shield them from liability claims. In any case, plaintiffs' lawyers will presumably have the same problem proving the applicable standard of care, as discussed above, along with the problem that it was breached by someone capable of being held liable.

Once human lawyers have been driven from the field, perhaps the dumb technologies described earlier in this Article and AI will not be so different in their impact. Arguably, humans will be free to ignore their AI's legal advice,

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68. *Id.*

69. *Id.*

70. Human juries may well disfavor such arguments, so perhaps we should hope that *they* are not replaced by robots.

71. Given the discussion so far, commentary to the effect that movements towards giving robots legal personality will help make corporations accountable seem positively naïve given the important role that corporations play in shielding humans. *See, e.g.*, James Vincent, *Giving Robots 'Personhood' is Actually About Making Corporations Accountable*, VERGE (Jan. 19, 2017, 10:45 AM), https://www.theverge.com/2017/1/19/14322334/robot-electronic-persons-eu-report-liability-civil-suits (writing about EU deliberations to redefine the legal status of robots).

even though unable to bypass the prohibitions of dumb code. But will the difference always be clear? The AI will no longer actually be a "lawyer" who provides advice in the traditional sense anyways. And in the countless ways that humans are evaluated, how will disregarding well-founded AI recommendations factor into such evaluations, particularly when those evaluations themselves increasingly involve technological enhancements? At what point will AI-enabled corporate "internal controls and procedures" continue to even permit corporate actions to be taken in violation of AI-enabled legal advice? Dumb technology may make it increasingly difficult to take such advice anyways, and even if humans can override it, the shareholder lawsuits for doing so seem obvious (as they do with existing controls and procedures regimes).

The preceding paragraph is particularly speculative, and the future is a vast field of question marks. That said, it is worth remembering that historically, technology appears to have driven human behavior as much as the reverse—and not always for the better. In their very useful essay on killer robots, Ian Kerr and Katie Szilagyi remind us of a simple example: how the development of mechanical tomato harvesting technology in the 1940s led to the development of sturdier (but less tasty) strains of tomato that could better survive the rigors of the "modern" harvesting process.[72] The result was better harvests but not better tomatoes, not to mention the loss of tens of thousands of human jobs.[73]

The logic of technologies, both those that are intelligent and those that are stupid yet meticulous and unforgiving, will inevitably impact the practice of law. The need to balance one's freedom of action and the possibility of being held responsible for the consequences of acting are basic features of human existence. Arguably, they never will be for AI or robots, at least not in a way that humans can understand. As stated earlier, it seems unlikely that AI will ever be able to engage in truly effective *advocacy*, which is one of the most basic and meaningful roles of any lawyer worth the title. The question is whether technology will allow any spheres where advocacy still matters, spheres where there are still human decision makers to both listen and be responsible—even if only morally—for making choices based on that advocacy.

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72. *See* Ian Kerr & Katie Szilagyi, *Asleep at the Switch? How Killer Robots Become a Force Multiplier of Military Necessity*, *in* ROBOT LAW 333, 352–56 (Ryan Calo et al. eds., 2016).

73. *Id.* at 352.

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